STATE OF MICHIGAN

COURT OF APPEALS

WALTER HARRIS,

Plaintiff-Appellant,

v

JERRY A. OLIVER, SR., MAYOR OF DETROIT, and CITY OF DETROIT,

Defendants-Appellees.

UNPUBLISHED
November 16, 2006

No. 263172
Wayne Circuit Court
LC No. 03-337670-NZ

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

In this action brought under Michigan's Whistleblowers' Protection Act, MCL 15.361 *et seq*., plaintiff appeals as of right the trial court's order dismissing his complaint.[1] We reverse and remand for further proceedings.

A trial court's decision to dismiss a plaintiff's claim for failure to participate in pretrial proceedings is reviewed for an abuse of discretion. *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998), aff'd 461 Mich 502 (2000). The interpretation and application of court rules presents a question of law that this Court reviews de novo. *Peters v Gunnell, Inc*, 253 Mich App 211, 225; 655 NW2d 582 (2002).

Plaintiff argues that the trial court abused its discretion because it exceeded its powers by sua sponte dismissing his complaint. We agree. "Dismissal is the harshest sanction that the court may impose on a plaintiff." *Schell*, *supra* at 475. As a result, a trial court must follow the procedure set forth in our court rules when entering an order of involuntary dismissal. *Id*. at 478-479.

[1] As an initial matter, we note that plaintiff's claim of appeal was timely filed. Plaintiff's motion to set aside the order of dismissal was filed within 21 days of the order of dismissal, and was therefore a timely postjudgment motion that deferred the period for perfecting an appeal of right. MCR 7.204(A)(1)(b); *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 288; 602 NW2d 572 (1999). Plaintiff filed his claim of appeal within 21 days of the order denying his motion to set aside the dismissal. Thus, his appeal was timely filed under MCR 7.204(A)(1)(b).

The applicable court rules in this case are MCR 2.401(G) and MCR 2.504(B). MCR 2.401(G)(1) provides that "[f]ailure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B)." MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

In *Schell*, *supra* at 478, we discussed whether these rules give the trial court power to sua sponte dismiss a case:

> MCR 2.401(G)(1) states that a party's failure to attend a scheduled conference constitutes *grounds* for dismissal under MCR 2.504(B). Thus, dismissal under MCR 2.401(G)(1) must proceed according to the strictures of MCR 2.504(B)(1), which states that "a defendant may *move* for dismissal of an action or a claim against that defendant" where the plaintiff fails to comply with the court rules or a court order. . . . MCR 2.504(B) provides no mechanism for a court to dismiss a case sua sponte, nor do we find any evidence in the record that defendant moved to dismiss plaintiffs' complaints for their failure to personally attend the [s]ettlement [w]eek conference. [Emphasis in original.]

In this case, the trial court acted on its own initiative in dismissing plaintiff's complaint, irrespective of the requirements of MCR 2.401(G) and MCR 2.504(B). The court thus exceeded its powers in dismissing the complaint, and we conclude that the sua sponte order of dismissal was an abuse of discretion.

We note that even if the trial court had possessed the power to sua sponte dismiss plaintiff's claim, its action still would have constituted an abuse of discretion. Dismissal is a drastic sanction that should be taken cautiously. *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998). Before dismissing a complaint as a sanction, a trial court "must carefully evaluate all available options on the record and conclude that dismissal is just and proper." *Id.* A judge who fails to evaluate all the options on the record before entering an order of dismissal abuses his or her discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995). The appropriateness of dismissal as a sanction is evaluated by considering several factors: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there was a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id*. at 507.

At the settlement conference, the trial court failed to consider all available options on the record before concluding that dismissal was proper. Instead, the trial court merely concluded that failure to attend the settlement conference mandated dismissal. The trial court stated, "[T]he failure to show means that the case will be dismissed so I'll do just that." As noted above, a judge who fails to evaluate all the options on the record abuses his or her discretion. *Id*. at 506-507. The trial court failed to consider any options other than dismissal in this case, and therefore abused its discretion.

Similarly, the trial court abused its discretion in ruling on plaintiff's motion to set aside the dismissal. At the hearing on that motion, the trial court again failed to consider any options other than dismissal. Instead of concluding that dismissal was just and proper after consideration of all relevant factors, the trial court simply refused to set aside the dismissal based on its belief that plaintiff did not wish the case reinstated.[2] That decision was not the result of a careful evaluation of all available options, and it constituted an abuse of discretion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

[2] The trial judge apparently concluded that plaintiff did not wish to have his claim reinstated after reading a newspaper article concerning this case.